Nos. 16-1424; 16-1435; 16-1474; 16-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf,
and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

JANET T. MILLS, Attorney General for the State of Maine; CHANDLER WOODCOCK, Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

PRELIMINARY RESPONSE/REPLY BRIEF FOR THE UNITED STATES

[*continued on next page*]

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REPLY IN SUPPORT OF APPEAL

I. Introduction

Our Principal Brief demonstrated that the district court erred in concluding that the Settlement Acts' definitions of the Penobscot Reservation ("Reservation") unambiguously exclude the Penobscot River ("River"). Defendants' responses failed to show otherwise. Proper application of statutory construction tools cannot lead to the conclusion that the Reservation is restricted to the island uplands. Most obviously, the on-reservation sustenance-fishing right of the Maine Implementing Act ("MIA"), 30 M.R.S.A. 6207(4), a critical component of the bargain struck in the Settlement Acts, can only be exercised in the River.

The Settlement Acts addressed the two categories of Indian land existing in Maine in 1980: (1) the land (including submerged land) most essential to the Passamaquoddy Tribe and Penobscot Nation ("Nation") which they had never conveyed and still held as their Reservations, see *Maine v. Johnson*, 498 F.3d 37, 47 (1st Cir. 2007) (referring to "reservation waters *retained* by the tribes under the Settlement Act, based on earlier agreements between the tribes and Massachusetts and Maine") (emphasis in original), and (2) land they had conveyed by state treaties and other means, the lawfulness of which was in serious question. The Settlement Acts confirmed the existing Passamaquoddy and Penobscot Reservations and set forth the parameters of tribal, state, and federal jurisdiction

over those lands (as well as additional lands to be acquired by the United States for the to-be-established Territories). Congress removed the cloud on the conveyed land's title by ratifying the transfers and extinguishing aboriginal title as to those lands. The question before this Court is whether the Main Stem, in whole or in part, falls within the first (reserved) or second (transferred) category.

Both the Nation and Maine had long understood that the Penobscot occupied and used a Reservation centered on the Main Stem islands. The Nation had historically relied on fishing and other River resources, and the islands reserved in the Treaties would have had little value if these fishing and hunting[1] grounds were not also reserved. The Nation viewed its existing Reservation as including the River, and would not have agreed to a settlement that reduced its existing Reservation to include only the island uplands. And until 2012, Maine itself agreed that the Reservation included the Main Stem riverbed, at least to the channel threads.

As explained below, Defendants' briefs are replete with mischaracterizations, material omissions, and inconsistencies. Maine's current contention that "no one, including the Tribe, regarded the river to be part of the Reservation" (Me.Br.31) is at odds with its own prior interpretation, and is based

[1] As used herein, "hunting" includes trapping and other means of taking wildlife.

on the unwarranted inference that all references to "islands," both pre-enactment and post-enactment, necessarily exclude the surrounding submerged land.

A tribe has both property rights and sovereign rights within its reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145 n.12 (1982). Defendants seek to deny the Nation's property and sovereign rights in the River, contrary to Congress's intent in the Maine Indian Claim Settlement Act ("MICSA") "to provide … the Penobscot Nation … with a fair and just settlement of their land claims." MICSA § 1721(a)(7). Properly read, the Settlement Acts reveal Congress's intent to confirm a Reservation for the Penobscot that includes at least some portion of their riverine homeland. Congress could not have intended to confine the Penobscot to the island uplands, leaving them with even less right to the surrounding riverbed and River resources than a non-Indian island landowner would presumptively possess.

II. Ambiguities in the Settlement Acts Must Be Resolved In Favor of the Nation

A. The Indian Canon of Construction Applies

Maine argues (Me.Br.24) that the canon of construction requiring statutory ambiguities to be resolved in favor of Indians does not apply because MIA's definition, Section 6203(8), unambiguously limits the Reservation to the island uplands. But Defendants have not come close to undercutting our demonstration that the Settlement Acts do not unambiguously exclude the riverbed.

Maine's argument (Me.Br.24-27) that MICSA §§ 1725(h) and 1735(b)[2] preclude the Indian canon's use in determining the Reservation boundaries is unpersuasive. Section 1725(h) provides that federal laws "generally applicable to … Indian nations … or to lands owned by … Indian nations" apply in Maine, except that no federal law "(1) which accords or relates to a special status … of … Indian reservations … , and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine" shall apply. The exception clause is most reasonably interpreted to address the jurisdictional arrangements within the Passamaquoddy and Penobscot Territories (which include the Reservations), not the process of determining the boundaries. Maine incorrectly asserts (Me.Br.26) that the Senate Report (P.D.282) "explains that sections 1725(h) and 1735(b) bar courts from [applying the Indian canon] when construing MIA and MICSA." It does not. The Senate Report (at 30-31 [JA___]) distinguishes the Supreme Court's narrow interpretation of "jurisdiction" in Public Law 83-280 from the broader meaning intended in Section 1725(h). Congress had to specify that it desired an expansive interpretation of state "jurisdiction" precisely because the Indian canon would otherwise apply and mandate a narrow interpretation. A statement of intent

[2] Maine's reliance on MICSA § 1735(b) is obviously misplaced as that provision only addresses federal laws "enacted after October 10, 1980."

about a single word—"jurisdiction"—in one provision does not suggest a general rejection of the Indian canon.

Nor, contrary to Maine's characterization (Me.Br.24-25), does application of the canon require a preliminary finding of the tribe's "disadvantage[]." The Supreme Court routinely applies the canon without regard to relative bargaining position because it is "grounded … in the values of structural sovereignty, not judicial solicitude for powerless minorities." Cohen's Handbook of Federal Indian Law, § 2.02[2] at 117 (2012 ed.). The general reference to "a dependent people" in *Tulee v. Washington*, 315 U.S. 681, 685 (1942), does not suggest otherwise. Courts have expressly rejected Maine's argument. *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (Indian canon's "applicability to ambiguous statutes purporting to benefit Indians is settled" without regard to the tribe's "legal sophistication"); *Connecticut v. U.S. Dept. of the Interior*, 228 F.3d 82, 92-93 (2d Cir. 2000) (ambiguities in a treaty should be resolved in the tribe's favor even where represented by counsel).[3] And subsequent to *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir. 1980) (suggesting in dicta that "the rule of construction operates with less force" where eminent counsel represented the tribe), the Ninth Circuit followed the Supreme Court's direction in *Merrion*,

[3] Maine's contention (Me.Br.25 n.14) that the Second Circuit misconstrued Supreme Court precedent is unfounded.

455 U.S. at 152, to construe ambiguities in federal law "generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (internal quotations omitted).

Finally, Maine misreads (Me.Br.27-28) this Court's decisions in *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007), and *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). This Court obviously did not reject the Supreme Court's repeated direction to apply the canon where there is statutory ambiguity, but simply perceived no ambiguity in the operative provisions. This Court has applied the Indian canon to the Settlement Acts where there was ambiguity. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999).

B. Defendants Cannot Deprive the Nation of the Indian Canon's Benefit by Incorrectly Denying that the Nation Has Inherent Sovereignty

Defendants' statutory misinterpretation results in part from their mistaken notion that the Maine tribes have no inherent sovereignty, but only the sovereignty the Settlement Acts "expressly provide[d] to" (Me.Br.18),[4] or "bestowed" on (Per.Br.22), them. In so doing, Maine repeats the mistake it made in *Bottomly v.*

[4] Maine incorrectly relies on *Maine v. Johnson*, 498 F.3d at 42. This Court correctly explained that the Settlement Acts had limited the Maine tribes' inherent authority and extended Maine's authority in "contrast[] with the status of Indian tribes in other states not subject to the Settlement Acts."

Passamaquoddy Tribe, 599 F.2d 1061, 1065 (1st Cir. 1979), "fundamentally misconceiv[ing] basic principles of federal Indian law" by viewing sovereignty as conditioned "on a showing that it had been granted to the tribe by the federal government." This Court explained that "the proper analysis is just the reverse": "The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never [been] extinguished," and while subject to defeasance by Congress, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id*. (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (internal quotation marks and citations omitted)).[5] The Nation retains this inherent sovereignty and is entitled to the Indian canon's benefit.

C. The Benefit of Any Doubt on the Reservation Boundary Does Not Go to the State Where, as Here, State Law Provides for Private Ownership of Nontidal Riverbeds

Maine relies (Me.Br.29) on two cases addressing whether the United States, in conveying public lands to tribes through pre-statehood treaties, also transferred beneficial ownership of the beds of navigable-in-fact waters. *Montana v. United States*, 450 U.S. 544 (1981); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). This case involves no such conveyance. A third cited case (Me.Br.28), *PPL*

[5] Contrary to Maine's suggestion (Me.Br.44 n.23), the United States did not deny the Nation's inherent sovereignty, but correctly explained that its authority is subject to the Settlement Acts.

Montana, LLC v. Montana, 132 S. Ct. 1215 (2012), addressed whether certain reaches of Montana rivers were navigable or nonnavigable under the federal-law definition, and thus whether riverbed title passed to Montana upon statehood under the Equal Footing Doctrine or the United States retained ownership.[6] This case does not involve any claim by the United States to riverbed title. The question here is whether the Nation reserved the riverbed in its treaty cessions (in which case the Nation has beneficial ownership with bare fee title in Maine) or whether the Nation ceded the riverbed (in which case Massachusetts' grantees obtained fee title).

None of these cases supports Maine's argument (Me.Br. 28) that the Nation can only "prove its claim to these assets of unique public importance through clear and explicit terms in the Settlement Acts." There is no presumption that operates against the Nation for the benefit of private riverside landowners.

[6] These decisions explain the difference between the English tidal approach to state riverbed title (which Maine and a minority of other states continue to follow) and the navigable-in-fact approach adopted by most states. *PPL Montana*, 132 S. Ct. at 1227 ("While the tide-based distinction for bed title was the initial rule in the 13 Colonies, after the Revolution American law moved to a different standard. … By the late 19th century, the Court had recognized the now prevailing doctrine of state sovereign title in the soil of the rivers really navigable.") (internal quotations omitted); *Idaho*, 521 U.S. at 285 (in the minority of states which retained the tide-based distinction, while the public has the "right of passage," the "riparian proprietor [is] presumed to hold title to the stream to the center thread of the waters (usque ad filum aquae), which accord[s] him the exclusive right of fishery in the stream"). The Equal Footing Doctrine reflects the prevailing approach.

D. There Is No Presumption That Statutory Ambiguities Should Be Construed Against Plaintiffs

Maine argues (Me.Br.47-48) that Congress intended to settle once and for all the status of Maine's land and natural resources, and suggests that statutory ambiguities should be construed against the Nation, the party it blames for causing the Reservation-boundary dispute. Every statute is enacted with the hope of undisputed implementation, but that hope is often disappointed. When a dispute arises, courts employ the tools of statutory construction. There is no presumption that the plaintiff loses.

If this Court concludes that the Settlement Acts unambiguously limit the Reservation to the island uplands, it will so hold without assigning blame for the dispute. But if this Court agrees with Plaintiffs that the Reservation definitions are ambiguous, the Nation should hardly be prejudiced for having sought judicial resolution of its Reservation boundaries, particularly when Maine itself previously read the Settlement Acts to include at least some portion of the riverbed (see U.S.Br.50-52).

III. The Settlement Acts' Text

Courts have a "duty to construe statutes, not isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995). When the Settlement Acts are read as a whole, it must be concluded that the Reservation does not exclude the riverbed.

A. MIA § 6203(8)—Definition of Penobscot Indian Reservation

Defendants fail to refute our showing that this provision, on which they principally rely, does not unambiguously exclude the riverbed.[7]

MIA defines the Reservation by reference to "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine."[8] Maine acknowledges (Me.Br. 35) that the referenced agreements are the 1796, 1818, and 1820 Treaties. It thus does not follow (Me.Br. 36) that the "Settlement Acts rendered the ancient treaties legally immaterial." The drafters chose not to draft a stand-alone definition, apparently not sharing Maine's current view that the treaty reservations are too hard to interpret.[9]

Defendants repeatedly assert that the Reservation's islands are "delineated" (Me.Br.34) or "listed" (Per.Br.1,4,5,7,8,12,22,28,30,32,33,35) in Section 6203(8).

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[7] Defendants dropped their prior reliance on MICSA § 1722(i), after we demonstrated (U.S.Br.18-19) that "lands" refers to both uplands and submerged lands.

[8] The Passamaquoddy Reservation is similarly defined by reference to the 1794 treaty with Massachusetts. MIA § 6203(5).

[9] Courts routinely interpret treaties for various purposes. See, *e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (treaty hunting and fishing rights); *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015) (whether treaty precluded application of National Labor Relations Act).

That is not true. The only listed island is Indian Island. Nicatow Island is mentioned as *not* included unless parcels are purchased after enactment. The other islands must be determined by reference to the treaty reservations minus any subsequently "transferred" islands. Permittees assert (Per.Br.20 n.10) that there are only two transferred islands, Nicatow Island and Smith Island. But the text does not so state, undercutting Defendants' argument that the text expressly reveals everything one needs to know. Defendants exaggerate this provision's detail and specificity. Me.Br.39 ("meticulously drafted"); Me.Br.43 ("drafted with great clarity"); Per.Br.9 ("pinpoint specificity"). The provisions specifying the allocation of sovereign authority among the tribes, Maine, and United States within the Reservations and to-be-established Territories are much more detailed than the Reservation definitions.

Defendants also fail to rebut our demonstration that "islands" is reasonably interpreted to include surrounding submerged land. A statute must be construed against the backdrop of existing law, including common law. *United States v. Texas*, 507 U.S. 529, 534 (1993). All parties agree that, under English common law as followed in Maine and a minority of other states, Maine does not own the bed of the nontidal Main Stem. The riverbed is presumptively owned by the owners of the adjacent upland parcels, including island parcels. See U.S.Br.27-28. In the ordinary situation, landowners on opposite sides of the channel each own to

the thread.[10] Permittees suggest (Per.Br.31 n.19) that an 1895 decision involving the same dispute as *Warren v. Westbrook Mfg. Co.*, 86 Me. 32, 40; 29 A. 927, 929 (1893), raises questions about the "specific dimensions" of the surrounding submerged land included in an island parcel. But it cannot be disputed that, under Maine common law, an "island" in a nontidal navigable-in-fact river presumptively extends to the channel threads.[11]

"Statutory language has meaning only in context." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). A generic dictionary definition of "island" (Me.Br.37), divorced from jurisdictional or geographical context, does not demonstrate that "islands" in Section 6203(8) unambiguously excludes surrounding submerged land. Defendants have never even specified whether, in their view, the assertedly unambiguous boundary is the top of the bank, the ordinary high-water line, the ordinary low-water line, or some other line.

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[10] In this circumstance, the Treaties determine the extent of riverbed ownership. They are properly interpreted as reserving the entire Main Stem riverbed, but must be interpreted as reserving the riverbed at least to the thread, as the Nation could not possibly have intended to reserve less submerged land than a non-Indian island owner would presumptively own. U.S.Br.35-43.

[11] An "island" in a tidal waterbody presumptively includes the intertidal zone under the Colonial Ordinance of 1641-47. *Hill v. Lord*, 48 Me. 83, 94 (1861).

We showed (U.S.Br.31-32) that a reservation of "islands" can be construed to include surrounding submerged land, pointing to *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Defendants' efforts to distinguish *Alaska Pacific Fisheries* (Me.Br.39-42; Per.Br.27-29) based on certain textual and historical differences[12] actually supports our general point that "islands" as a boundary definition is ambiguous, requiring analysis of the whole statute, the reservation's purpose, background legal principles, and factual context. Further, Maine's argument (Me.Br.42) that Congress reserved submerged land to provide the Metlakahtla Indians with a commercial salmon fishery, but did not reserve submerged land for the Penobscot because they were only getting "a qualified right to take what fish they can catch for their individual sustenance" in a "depleted" salmon fishery, unfairly attributes to Congress a stinginess that is belied by Congress's stated purpose "to provide … the Penobscot Nation … with a fair and just settlement of their land claims," MICSA § 1721(a)(7). And there is no way to square Maine's acknowledgment (Me.Br.42), however grudging, of the Penobscots' on-reservation salmon-fishing right with its position that the River is entirely outside the Reservation (see Part III.B below).

[12] Maine's assertion (Me.Br.40 n.20) that "[t]he U.S. has admitted that it is not the trustee of the Reservation" mischaracterizes the cited document, which argues that the United States' trust relation with the Nation warrants intervention. See ECF46 at 5-10 [JA___].

Permittees' argument (Per.Br.9-10) that the Reservation definition must exclude the riverbed because it does not expressly refer to "water and water rights" or other "natural resources" listed in MIA § 6203(3) is also unavailing. The Passamaquoddy and Penobscot Reservations were defined by reference to the areas reserved from treaty cessions, not by enumeration of types of land (uplands or submerged lands) or natural resources.

Finally, Maine's reliance (Me.Br.35) on the word "solely" ignores our demonstration (U.S.Br.28-29) that "solely" is reasonably understood to exclude islands other than those specified (including Marsh Island and the islands created after 1818 by dam construction) rather than to separate each island's upland from the surrounding riverbed. Permittees interpret "solely" as we do. Per.Br.35.

B. MIA § 6207(4)—Sustenance-Fishing Right

Section 6207(4) provides that Passamaquoddy and Penobscot members "may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance." In interpreting Section 6203(8) without regard to the sustenance-fishing provision, Defendants ignore the fundamental principle that a statute must be read "as a whole." *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996); *Colon-Marrero v. Velez*, 813 F.3d 1, 11 (1st Cir. 2016). They fail to undercut our demonstration that the Reservation must include at least some portion

of the River for Section 6207(4)'s on-reservation[13] sustenance-fishing right to have any content. Indeed, Maine concedes (Me.Br.19), with remarkable understatement, that "it is not obvious on the face of the statute how the sustenance fishing provision applies to PN members" if the Reservation entirely excludes the River. Defendants' uplands-only interpretation must be rejected because it renders the on-reservation fishing right illusory.

Maine (Me.Br.39), like the district court (U.S.Add.61), errs in suggesting that Section 6207(4)'s reference to "their respective Indian reservations" might mean something other than the Reservations defined in Section 6203. Numerous provisions—such as Section 6207(1) —use the similar phrase "within their respective Indian territories" without any doubt that this refers to the Territories defined in Section 6203. "One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning …." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014) (internal citations omitted); *Gustafson*, 513 U.S. at 570 (same). This presumption can be overcome, but nothing in MIA suggests different meanings of "reservation" and any ambiguity must be resolved in the Nation's favor.

[13] Although tribes sometimes enjoy off-reservation treaty hunting and fishing rights, see *Tulee*, 315 U.S. at 684, the Penobscots' Treaties reserved from cession their most important hunting and fishing territory—the River.

Maine similarly errs (Me.Br.43) in characterizing the sustenance-fishing right as "ancillary." To the contrary, it is plainly a critical element of the bargain struck in the Settlement Acts. See P.N.Br.42-29; U.S.Br.43-45. The cases Maine cites regarding "ancillary provisions" are inapposite.

The district court properly rejected Maine's theory that the sustenance-fishing right can be satisfied by Penobscot members casting into the River from their island banks. U.S.Add.59-60. Maine dropped this argument on appeal, but Permittees seek to keep it alive with a cursory assertion (Per.Br.43) that "PN members can fish the Penobscot River while they are located on [the Reservation] islands," making no effort to explain how the district court erred. Permittees ignore the common-law rights the private riverbed owners would have if Defendants were correct that the riverbed is outside the Reservation.

Our Principal Brief demonstrates that Maine common law affords private riverbed owners the exclusive right to fish above the bed (unless the estates have been expressly severed). U.S.Br.21-24 (discussing, *inter alia*, *In re Opinions of the Justices*, 118 Me. 503, 106 A. 865 (Me. 1919)).[14] Maine professes

[14] The Maine Supreme Court was well aware that other states had afforded a public fishing right in nontidal navigable-in-fact rivers by establishing *state* riverbed ownership by judicial decision or legislation, but explained that Maine retained the common-law rule. *Brown v. Chadbourne*, 31 Me. 9, 21-22 (1849).

disagreement (Me.Br.53 n.28), but fails to rebut our articulation of its common law, citing only an 1882 Massachusetts decision, *Cole v. Inhabitants of Eastham*, 133 Mass. 65 (1882), and wholly ignoring the controlling Maine precedent.[15] "[T]he State is the trustee of public rights in rivers such as the Main Stem." See Me.Br.6-7, 28 n.16 (citing *Mullen v. Penobscot Log-Driving Co.*, 38 A. 557 (Me. 1897) (addressing Maine's grant of rights to impound and release water for floating logs to market, an aspect of navigation)). But these common-law public rights do not include the right to fish. They are limited to navigation, the passage of fish, and the flow of the water for various purposes. See U.S.Br.23-26.

Permittees fail to identify any legal basis for distinguishing between a Penobscot fisherman in a boat above the riverbed and one casting into the river from the adjacent upland. The operative fact is not whether the fisherman's body is trespassing (mere boating is not trespass because of the public navigation right), but whether the fisherman is taking someone else's fish.

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[15] In a 1997 filing with the Federal Energy Regulatory Commission ("FERC"), Maine suggested that Maine law had "developed" on this point since 1919 but cited no authority. See U.S.Br.51; ECF105 at 2561-2562 n.11 [JA___]. The Maine Supreme Court has in recent years addressed the line between public and private rights in the *intertidal zone*, which is privately owned but subject to public rights of fishing, fowling and navigation under the Colonial Ordinance of 1641-47. See, *e.g.*, *McGarvey v. Whittredge*, 2011 Me. 97, 28 A.3d 620 (2011) (holding that the public can cross the intertidal zone to access the ocean for scuba diving). But the Colonial Ordinance has never been applied to nontidal rivers.

Maine's "open lands tradition" encourages private landowners to open their lands for public recreational activities, including hunting and fishing, by affording them a "rebuttable presumption that public recreational uses are undertaken with the permission of the landowner" so as to avoid claims of prescriptive easement. *Almeder v. Town of Kennebunkport*, 106 A.3d 1099, 1111-12 (Me. 2014). But that choice is made by private landowners. If the riverbed is not within the Reservation, Penobscot members could fish at the discretion of the non-Indian riverside landowners, but Section 6207(4) secures the Nation's *right* to fish.

In contrast, within the Reservation, the Nation's right to fish is now governed by the Settlement Acts' specific terms, including MIA § 6207(3), which provides that the Maine Indian Tribal-State Commission can regulate fishing "on a nondiscriminatory basis."

C. MICSA § 1723—Transfers Ratified

Defendants' sweeping argument that the entire Main Stem riverbed was "transferred" under MICSA § 1723 (Me.Br.53-57; Per.Br.17-23) is not supported by MICSA's text, purpose, or legislative history.

Through Section 1723(a)(1), Congress deemed "transfer[s] of land or natural resources" from the Nation "to have been made in accordance with" federal law, and "ratif[ied]" them "effective as of the date of said transfer." Section 1723(b) further provided that, if the Nation had "aboriginal title" to such transferred land or

natural resources, that title was "extinguish[ed]" "as of the date of such transfer." MICSA did not extinguish aboriginal title to untransferred land and natural resources.[16]

MICSA § 1722(n) defines transfer to include "any act, event, or circumstance that resulted in a change in … dominion over, or control of land or natural resources."

1. The Nation Did Not Cede the Riverbed in the Treaties

We acknowledge, of course, that a treaty cession is a "transfer," but deny (U.S.Br.35-43) that the Nation ceded the Main Stem riverbed in its 1796 and 1818 cessions to Massachusetts. Maine does not rebut this demonstration, and never affirmatively asserts that the riverbed was ceded, which is fairly taken as a

[16] Defendants suggest that the Nation and United States have different positions on the Nation's interest in the Reservation. The difference is more semantic than substantive. Plaintiffs agree that aboriginal title (also called "original Indian title") was not extinguished within the Reservation, although the United States views "recognized title" as the more appropriate term for "tribal property that has been formally acknowledged by Congress through treaty or statute." See Cohen's Handbook, § 15.04[3][a] at 1004-05. This title is undisputedly subject to the Settlement Acts. See Me.Br.50 (quoting the United States' counsel). We think "ownership" is an appropriate characterization of both aboriginal and recognized title, while the Nation's counsel has hesitated to so label the Nation's interest. Plaintiffs have both clearly asserted that the riverbed is within the Reservation, which is the operative fact. See ECF156 at 74-75 [JA___].

concession that the riverbed was not ceded. Permittees offer no coherent position on whether the 1796 and 1818 cessions included the riverbed.[17]

Maine instead focuses (Me.Br.7,56) on Massachusetts' deeds granting the riverside parcels. But it is axiomatic that "a deed may convey only property that was owned by the grantor." *Wells v. Powers*, 873 A.2d 361, 363 (Me. 2005). The Settlement Acts define the Reservations by reference to the Treaties, not Massachusetts' subsequent conveyances. Massachusetts' deeds might provide some indication of its understanding of the Treaties, but the primary evidence is the Treaties themselves, interpreted using the Indian canon of construction. See *Mille Lacs*, 526 U.S. at 196.

[17] While purporting to present a "plain text" (Per.Br.3) argument consistent with their limited motion for judgment on the pleadings, Permittees ask this Court to address issues of aboriginal use and treaties predating the Treaties referenced in the Settlement Acts. Permittees first argue that the Nation likely never even established aboriginal title to *any* territory (Per.Br.19 n.9), and that, even if it did, 1713 and 1725 treaties with England extinguished *all* the Nation's aboriginal title (Per.Br.14 n.6). Massachusetts apparently did not hold this view as it entered into the 1796 and 1818 Treaties to obtain cessions of the Nation's aboriginal title. And while Congress made no determination of the extent of the aboriginal holdings of the Passamaquoddy, Penobscot and Houlton Band as of 1790, Congress differentiated between them and "other" tribes "that once may have held aboriginal title to lands within the State of Maine" but "long ago abandoned their aboriginal holdings." MICSA § 1721(a)(2). Permittees next argue (Per.Br.20 n.10) that the Nation's aboriginal title was *completely extinguished* by 1818. But the Settlement Acts' definitions of the Passamaquoddy and Penobscot Reservations evidence the understanding that the tribes' reserved *some* territory (their Reservations) in their treaties with Massachusetts.

Contrary to Maine's allegation (Me.Br.7), it has never been determined that Massachusetts' post-treaty conveyances of riverside parcels included the riverbed. Maine's allegation is based on its own Statement of Material Facts (ECF118), which Plaintiffs denied or admitted with qualifications in material respects. See ECF140 ¶¶186-222 [JA___]. Maine's specific allegation (Me.Br.8) that "[m]any of the deeds from Massachusetts and Maine contain language that confirms the riverside lots include the submerged land to the thread of the Main Stem" lacks support in the record. The cited paragraphs (¶¶206-21) simply quoted some phrases from 16 deeds (nine deeds from Massachusetts and seven from other grantors), none of which expressly referenced "submerged land" or "thread." Plaintiffs admitted that the deeds included the quoted phrases, but did not admit that the conveyances included any submerged land. ECF140 ¶¶206-21 [JA___]. Maine offered no deeds from Massachusetts, or subsequent grantors, that expressly included the riverbed.

Six of the nine Massachusetts deeds utilized a boundary call to the "side" of the River,[18] which suggests Massachusetts' understanding that it had no riverbed to

[18] See ¶206 (the head line "strikes the easterly Bank of Penobscot"; "down on the Easterly side of said River"); ¶217 ("down by the side of Penobscot River"); ¶218 ("down by the side of Penobscot river"); ¶219 ("up by the side of Penobscot River"); ¶220 ("northerly by the side of the River"); ¶221 ("northerly by the side of the River").

convey. References to the "side" of the river can express the parties' intent to separate the riverbed depending on the circumstances of the grant. U.S.Br.37-38. Kenneth Roy, a federal government surveyor, testified in his deposition that the phrases "to the bank of the river" and "down by the side of the Penobscot River" in these circumstances likely indicate Massachusetts' intent to convey only the riverside upland parcel. ECF110-58 at 6632 [JA__].[19] Contrary to Maine's argument, this body of deeds tends to show Massachusetts' understanding that the Nation reserved the riverbed in the Treaties.

Maine relies on the presumption that a grantor who undisputedly owns both the upland and adjacent submerged land intends to convey the entire parcel unless there is evidence of contrary intent.[20] See, e.*g.*, *Stuart v. Fox*, 152 A. 413, 415 (Me. 1930). But the question here is whether Massachusetts ever owned the riverbed. If the Nation did not cede the riverbed, Massachusetts could not convey it, regardless of any presumption applied to its deeds.

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[19] The other three deeds from Massachusetts (¶207, ¶208, ¶216) use the phrase "by said river," which does not clearly express any understanding about the riverbed. The remaining seven referenced deeds are conveyances from parties later in the chain of title which provide even less evidence of Massachusetts' treaty intent.

[20] The submerged land's value to the grantor apart from the upland, such as for fishing privileges, is evidence of the grantor's intent to retain the submerged land. *McLellan v. McFadden*, 95 A. 1025, 1028-29 (Me. 1915). This principle, as applied to the Treaties, supports the Nation's intent to reserve the riverbed when ceding the uplands on both sides of the River.

Moreover, Massachusetts could not possibly have thought that the Nation failed to reserve the riverbed at least to the channel threads. Maine has offered no theory as to how Massachusetts could have intended to convey the entire riverbed all the way to the island banks without including any express language to that effect.

2. Maine's Regulation Did Not Effect a "Transfer"

Defendants argue in the alternative (Me.Br.53-57; Per.Br.17-23) that, even if the Nation did not cede the River, Maine's exercise of regulatory authority constituted a change in "dominion and control over the Main Stem" amounting to a MICSA-ratified "transfer." Defendants' transfer-by-regulation argument is wrong for four reasons.

First, Defendants misinterpret "dominion over" to mean "regulation of." The Supreme Court has equated "dominion" with property rights, not regulation. *Merrion*, 455 U.S. at 145 n.12 ("Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.") (internal quotation marks and citations omitted).

Permittees incorrectly deny (Per.Br.23-24) that the Nation has any property rights in the Reservation, asserting that the Nation's aboriginal title was extinguished even within the Reservation and that the Nation thus "do[es] not 'own' [its] Reservation[]." In their view, Maine, as the asserted trustee for the

Reservation, holds the entire property interest.[21] Permittees' extreme position is refuted by the Settlement Acts' text, legislative history, and the Supreme Court's explanation of reserved aboriginal rights within the original 13 states.

MIA characterizes the Nation's interest in the Reservation as "ownership." Within their Territories (including their Reservations), MIA § 6207(1) provides that "the Passamaquoddy Tribe and the Penobscot Nation … may exercise … all the rights incident to ownership of land under the laws of the State." MIA's legislative history underscores that "[t]he jurisdictional rights granted by this bill are coextensive and coterminus (sic) with land ownership." P.D.264: 3971 [JA___]. Further, in a colloquy with Senator William Cohen of Maine in the Senate hearing on MICSA, Maine Attorney General Richard Cohen agreed that aboriginal title, while sometimes described as a "possessory life estate," "is equivalent, for practical purposes in this case, to a fee title." P.D.278: 4455

[21] Permittees base (Per.Br.24 n.13) their argument on a 1983 letter from an Interior Assistant Solicitor to FERC, ECF110-28 at 6340 [JA___], referring to Reservation land as "held by the State of Maine in trust for the benefit of the Penobscot Nation which possesses the right of perpetual occupancy and use." In this context, "trust" merely referenced the separation of bare fee title and the beneficial interest, and in no way repudiated the Nation's property interest or the federal trust relationship. Maine's authority and obligations are as specified in the Settlement Acts, and federal protections prohibit its interference with the Nation's rights. Indeed, the letter explained that the land is subject to federal restrictions on alienation under MICSA, and that Bangor Hydro-Electric needed to obtain a right-of-way from the Nation for the West Enfield Dam under Interior regulations applicable to tribal land.

[JA___]. We do not understand Maine to now dispute that the Nation retained its aboriginal title within its Reservation.

Permittees also ignore the Supreme Court's clear explanation that, "although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized." *Oneida Indian Nation of New York State v. Cty. of Oneida*, 414 U.S. 661, 667 (1974) ("*Oneida I*"). The Court emphasized that the "Indian 'right of occupancy is considered as sacred as the fee simple of the whites,'" *id*. at 668-69 (quoting *Mitchel v. United States*, 34 U.S. 711, 746 (1835)), and that "Indian title is a matter of federal law and can be extinguished only with federal consent," including in "the original 13" States, *id*. at 669-70 (citing *Fletcher v. Peck*, 6 Cranch 87 (1810)). The Indian right of occupancy is "'an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption.'" *Id*. at 671 (quoting *The New York Indians*, 5 Wall. 761, 771 (1867)).[22] The Supreme Court reaffirmed these principles in *Oneida County of*

[22] Pre-emption is the right to purchase the Indians' title to land, to the exclusion of other potential purchasers, if they want to sell it. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

New York v. Oneida Indian Nation, 470 U.S. 226, 234 n.3 (1985) ("*Oneida II*") (Indians with aboriginal title have "a *legal* as well as just claim to retain possession of [the soil], and to use it according to their own discretion") (emphasis added).

In contrast, a state's interest in land subject to aboriginal title, although called "fee title," is minimal. See *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107, 116 (N.D.N.Y. 1991) (New York's right of preemption "is not a property right, but rather a mere expectancy concerning the property, with no right vesting in such person until Congress acts to extinguish the Indian interest in the land").

Second, the state regulations Defendants rely on (Me.Br.6-7; Per.Br.13-16) protect the public's well-recognized common-law rights of navigation and fish passage, which are consistent with the Nation's riverbed ownership.

The 1818 Treaty expressly acknowledged the public's common-law navigation right. See U.S.Br.5. The Nation's authority regarding navigation was thus subordinate to Maine's navigation servitude, just as Maine's authority is subordinate to the United States' authority over navigable waters. *Montana v. United States*, 450 U.S. at 555 (the "United States retains a navigational easement in [all] navigable waters … regardless of who owns the riverbed"). Maine's regulation of navigation was not inconsistent with an understanding that the Reservation included the Main Stem riverbed, which was necessary for the

Penobscot to enjoy the property rights (most importantly fishing and hunting[23]) tied to riverbed ownership.

Similarly, state regulations protecting the passage of migratory fish for the benefit of all with rights to take the fish, including the public in downstream tidal waters,[24] coexisted with the private property right of nontidal riverbed owners to fish in a manner consistent with the public's interest in preservation of the species. Contrary to Maine's argument (Me.Br.8-9), Penobscot petitions to Maine to protect its fisheries from non-Indians are evidence of their understanding that the Reservation included the River.

Maine argues that the Nation made no attempt to limit non-Indian use of the River. This is hardly surprising given Maine's and the federal government's mistaken view that the Maine tribes lacked inherent sovereignty (Me.Br.8), which this Court and the Maine Supreme Court corrected in the 1970s. See *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (holding that the United States had a duty under the Indian Nonintercourse Act, 25

[23] The right to hunt is similarly tied to soil ownership. *Hill v. Lord*, 48 Me. at 100.

[24] Maine's assertion (Me.Br.7) that Massachusetts and Maine regulated fishing "on the Main Stem since 1789" is misleading. In the 1700s and early 1800s, the cited state regulations were directed to the lower Penobscot downstream of the Main Stem where the non-Indians resided.

U.S.C. 177, to investigate and take appropriate action to protect the Tribe's aboriginal rights);[25] *Bottomly*, 599 F.2d at 1066 (holding that Maine's historical involvement did not divest the Tribe's inherent sovereign immunity from suit); *State v. Dana*, 404 A.2d 551 (1979) (holding that "Indian country" for purposes of criminal jurisdiction included land the Passamaquoddy held by Indian title since 1790). Maine did not even afford the Passamaquoddy and Penobscot the right to vote in state elections until 1967. See Willard Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 Nevada L.J. 126, 139 (2004) (Maine was the last state to grant Indian suffrage).

Third, the Senate Report (Me.Br.55) does not support Maine's argument when one considers the underscored phrase Maine omits: "transfer" "cover[s] all conceivable events and circumstances under which title, possession, dominion, or control of land or natural resources can pass from one person or group of persons to another person or group of persons." Senate Report at 21 [JA__]. This description does not fairly encompass state regulation without any change in property rights.

[25] Following this decision, the United States recognized its trust responsibility to the Passamaquoddy Tribe and Penobscot Nation and undertook a government-to-government relationship with them. See 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979).

Fourth, we pointed out (U.S.Br.45 n.20) that state regulation of the River cannot constitute a "transfer" because Maine also regulated the island uplands[26] but Maine does not contend that the island uplands were "transferred."

Maine's two responses to this point (Me.Br.57 n.32) are unpersuasive. Maine's first response is circular. It asserts that "the transfer provisions obviously do not apply to the islands that MIA explicitly designates as PN's Reservation." But the only island explicitly designated in MIA § 6203(8) is "Indian Island." The islands north of Indian Island are part of the Reservation only if they were not "transferred."

Maine's second response—that Maine historically protected the Nation's "right of use and occupancy in its reservation islands" but not in "the waters or bed of the Main Stem"—is demonstrably false. The referenced Penobscot petitions sought state assistance principally to protect their *fisheries*, as Maine recognized by discussing them in its Statement of Material Facts under the heading "Before the 1980 Acts: The Penobscot River Fisheries." See ECF140 ¶¶117-122 [JA___]. Maine's quotation (Me.Br.57 n.32) of a report by the Maine Indian Affairs Committee misleadingly omits the underscored words which disprove its assertion: "[I]t is the duty of the Indian Agent to attend to the rights of said Indians, to see

[26] Maine elsewhere acknowledged (Me.Br.8) that "[b]efore 1980, the Tribe, its members *and their lands* were regarded as fully subject to the State's jurisdiction" (emphasis added).

that there are no encroachments made by the whites upon the Indians Islands, their fishing and other privileges …." See ECF140 ¶122 [JA___].

The flaw in Maine's "transfer" argument is underscored by Permittees' rejection of Maine's distinction between its regulation of the island uplands and the River. In Permittees' view, the "dominion" and "control" Maine exercised was so extensive that it effected a "transfer" of all the Nation's land and natural resources, such that Section 1723(a) ratified the transfer of all its property interests and Section 1723(b) extinguished all the Nation's aboriginal rights. Per.Br.24.[27] Congress could not have intended the transfer provision to sweep so broadly. Congress was well aware from this Court's decisions in *Morton* and *Bottomly* that Maine had long denied the Maine tribes' sovereign authority and had subjected Maine Indians to its own sovereign authority. Senate Report at 12-13 [JA___]. If Congress thought Maine's actions had extinguished all aboriginal title, including to the land the tribes reserved from cession in their treaties, Congress would have drafted a very different statute. There would have been no need for a "transfer" provision, the point of which was to differentiate between the tribes' Reservations and the additional land to which the tribes claimed aboriginal title. Congress

[27] Permittees' transfer/extinguishment argument is not limited to the Penobscot but extends to the entirety of the Passamaquoddy Tribe's aboriginal title as well. See, *e.g.*, Per.Br.19 n.9.

would simply have extinguished all aboriginal title and provided for the establishment of new territories.

D. MICSA § 1731—Discharge of Maine's Treaty Obligations

Section 1731 affords Maine "a general discharge and release of all obligations … arising from any treaty or agreement with, or on behalf of any Indian nation" "[e]xcept as expressly provided herein." Contrary to Maine's argument (Me.Br.35-36, 51), this provision does not compel the riverbed's exclusion from the Reservation. In return for the Nation's cession of land on both sides of the River in the 1796 and 1818 Treaties, Massachusetts undertook certain treaty obligations, such as annual distributions of corn, molasses, tobacco, cloth, etc., which Maine then assumed at statehood. P.D.6, P.D.8, P.D.10 [JA_____]. MICSA § 1721(a)(9) acknowledges the "special services" Maine provided to Maine Indians, whether as treaty obligations or voluntary undertakings.

These are the discharged "obligations." The Reservation boundary is not fairly characterized as such an "obligation." And even if it were, the obligation to respect the boundary would not be discharged in light of the qualifying phrase "except as expressly provided herein."

E. MIA § 6204—State Laws Apply to Indian Lands

Section 6204 provides that Indian "lands or other natural resources" are subject to Maine law and the jurisdiction of its courts "[e]xcept as otherwise

provided in this Act." Permittees obviously misread this provision (Per.Br.10) in arguing that the Reservation must exclude the River because "natural resources" includes "waters." This provision explains the jurisdictional arrangements within the Passamaquoddy and Penobscot Territories but says nothing about their boundaries. And as we explained (U.S.Br.18-19), submerged land is a form of "land" and this provision's reference to "natural resources" encompasses "land."

Because Maine's law and courts' jurisdiction generally extend to the Reservation, whether the Reservation includes some or all of the River makes little appreciable difference to Maine's non-Indian citizens. In contrast, the Penobscots' retention of their hunting and fishing rights as specifically guaranteed in the Settlement Acts is of great importance to them.

F. MIA § 6205(3)(A)—Replacement Lands

Section 6205(3)(A) authorizes lands "contiguous" to the Passamaquoddy and Penobscot Reservations to be added to the Reservations in replacement of Reservation lands taken by eminent domain, and further provides that "land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation." Defendants argue (Me.Br.46, Per.Br.11) that this provision is superfluous if the Main Stem riverbed is part of the Penobscot Reservation. This contention is incorrect. Section 6205(3) deems the entire Penobscot River, not just the Main Stem, part of the Reservation for purposes of

finding suitable replacement land for its Reservation, which is appropriate given the River's centrality to the Penobscot. The River flows south for about 30 miles below Indian Island.

G. MIA § 6206—The Tribes' General Authority Over Their Territories

Section 6206 details the powers and duties of the Passamaquoddy Tribe and Penobscot Nation within their Territories. Defendants sound baseless alarms about adverse consequences to Maine's non-Indian citizens if the River is acknowledged to be within the Reservation. The scope of the Nation's authority over nonmember conduct within the Reservation is specified in the Settlement Acts, to which Maine expressly agreed.

Maine professes concern (Me.Br.26 n.15) that, if the Reservation includes the riverbed, the Nation "could … try to tax the owners of submerged lands." But the Reservation boundary, wherever it is determined to be, is the limit of the land the Nation has always owned by aboriginal title, confirmed in MICSA. There is no non-Indian submerged land within the Reservation for the Nation to tax.

Permittees' concerns (Per.Br.10 n.4) that, if the Reservation includes the riverbed, the Nation can "block[] access" and "prohibit[] discharges" are also groundless. We have acknowledged throughout this litigation that the Nation cannot block access to the River for navigation. And this Court held in *Maine v. Johnson*, 498 F.3d at 45, that Maine has permitting authority under the Clean

Water Act with respect to facilities discharging into waters within the Passamaquoddy and Penobscot Territories.[28]

With respect to Permittees' concern about tribal licensing authority (Per.Br.10 n.4), the Nation can require licenses related to the hunting jurisdiction that Maine expressly agreed it would exercise (MIA § 6207(1)). That was a critical part of the bargain for the Tribes. But tribal "ordinances shall be equally applicable, on a nondiscriminatory basis, to all persons" except for members' sustenance. *Id*. Defendants do not specify what other licenses they might be concerned about.

H. MIA § 6207—Regulation of Fish and Wildlife

1. MIA § 6207(1)(A)—Tribal Regulation of Hunting

Section 6207(1)(A) sets forth the tribes' authority to regulate hunting within their Territories. Maine points out (Me.Br.44-45) that this provision would not be nullified if the Reservation were defined to exclude the riverbed since the Nation's

[28] There is an ongoing EPA proceeding and a pending suit, *Maine v. McCarthy*, Civ. No. 1:14-cv-00264 (D. Me filed July 7, 2014), regarding the establishment of water quality standards under the Clean Water Act that are sufficiently protective of tribal sustenance fishing. If the Reservation boundary is restricted to the island uplands, such that the Settlement Acts do not afford a sustenance-fishing right in the River, Permittees believe they will get the benefit of less stringent limitations on the discharge of toxics. See Matthew Manahan and Catherine Connors, *Water, Tribal Claims, and Maine's Not-So-Settled Settlement Acts*, Natural Resources & Environment, Fall 2016, at 24-28. This question should not influence the Settlement Acts' interpretation.

authority extends to its larger "Territory." That is true, but of no import. Hunting in the River near their island homes has always been particularly important. Moreover, the fact that this provision would still have some effect hardly demonstrates that Section 6203(8) unambiguously excludes the River.

2. MIA § 6207(1)(B)—Tribal Regulation of Ponds

Section 6207(1)(B) sets forth the tribes' authority to regulate fishing in ponds smaller than 10 acres in surface area, but reserves to Maine or the Maine Indian Tribal-State Commission authority over "great ponds." The provision distinguishes the ponds subject to tribal jurisdiction based in part on whether "all submerged lands are wholly within Indian territory." Contrary to Maine's argument (Me.Br.38-39), the absence of the phrase "submerged lands" in the Passamaquoddy and Penobscot Reservation definitions does not demonstrate that submerged lands are excluded. As noted above, the Reservations were defined by reference to the areas reserved from the treaty cessions, not by the types of land (uplands, riverbeds, beds of great ponds, or beds of smaller ponds).

IV. The Settlement Acts' Factual Context

Maine properly acknowledges (Me.Br.4) that the factual context in which the Settlement Acts were passed helps to interpret the Reservation boundaries. But the record does not support its allegation (Me.Br.31) that no one thought the River was part of the Reservation. Maine interprets all references to "islands" as

expressing an understanding that the adjacent riverbed was excluded. See Me.Br.5,9,11,39 n.19,48. But that is not a fair inference, as explained above.

The Nation's conduct prior to the Settlement Acts does not evidence an understanding that its Reservation excluded the River. Penobscots demonstrated their understanding that their Reservation included the Main Stem riverbed by continually utilizing the River's resources from aboriginal times through 1980. See PN.Br.4-9; U.S.Br.3-4. Defendants have not challenged the district court's factual findings on Penobscot sustenance fishing in the Main Stem bank to bank (U.S.Add.24,28-29,57,61).[29]

Maine's assertion (Me.Br.11) that there is "no record of any objection from the Tribe on the grounds that the [Great Works, Milford, West Enfield, and Mattaceunk] dams were being built on or within its reservation" has little force.[30] The Maine Department of Health and Welfare filed a protest on the Nation's behalf in the cited (Me.Br.10) Great Works Dam licensing proceeding, although it

[29] The Nation was not in a position to exercise sovereign authority over non-Indian use of the River before the Settlement Acts, but that does not mean that it was not exercising sovereign authority over its own members. It was not unusual for tribes that were not recognized by the United States and had not reorganized under the Indian Reorganization Act of 1934, 25 U.S.C. 5101 *et seq*., to exert authority over members by means other than written codes.

[30] Great Works Dam and Milford Dam were constructed south of Indian Island (the southernmost Penobscot island), although the dams affected the Nation's fisheries and flooding from Milford Dam inundated Reservation islands.

withdrew it for unstated reasons. *Penobscot Chem. Fibre Co.*, 30 F.P.C. 1465, 1467 (Dec. 9. 1963). Maine purported to act as the Nation's trustee throughout this period. When the Milford Dam was constructed in 1906, "state or local officials" granted an easement allowing flooding of upstream Reservation islands. See *Bangor Hydro-Electric Co.*, 83 F.E.R.C. 61037, 61083 (Apr. 20, 1998). If Maine as trustee allowed Reservation islands to be flooded to facilitate dams, one can hardly infer anything from the fact that Maine did little to protect the Nation's interests in the River. Further, the record does not reflect the circumstances surrounding the grant of these and any other easements. Any lack of reported protest says little about the Nation's view of its Reservation boundary.

Nor does the record support Maine's allegation that the United States believed prior to the Settlement Acts that the Reservation excluded the Main Stem riverbed. See Me.Br.9 (United States' 1995 position "came after consistently taking contrary positions for decades"). Until this Court's 1975 *Morton* decision, the federal government believed it had no responsibility for the Maine tribes, paid little attention to them, and had no reason to consider the Reservation boundary. The four cited Federal Power Commission ("FPC") decisions (Me.Br.10) are not fairly read to state any view about the Reservation boundary. Maine's reliance (Me.Br.11,39 n.19) on Interior's 1977 draft litigation report in *United States v. Maine* ECF102-8 [JA__] is similarly unavailing. In our response to ECF118 ¶11,

we explained that the reference to "islands" does not evidence any intent to exclude the riverbed. ECF140 ¶11 [JA__].

Maine argues that the River's resources were so important to Maine's non-Indian citizens that no one could have understood the Reservation to include the River. But Maine overstates the River's significance for non-Indian recreational use during the 1970s. The cited FPC decisions reveal that the River was badly polluted (including by Permittees) in the years before the Settlement Acts. See *Bangor Hydro-Electric Co.*, 43 F.P.C. 132, 133 (Feb. 3, 1970) ("reservoir [at West Enfield Dam] has little recreational use at the present time due to the polluted condition of the river"); *Bangor Hydro-Electric Co.*, 42 F.P.C. 1302, 1303 (Dec. 31, 1969) ("River at the [Milford Dam] project is seriously polluted"). Conversely, Maine denigrates the River's importance to the Nation, pointing (Me.Br.42) to the depleted fisheries in 1980. Maine cannot have it both ways. Despite the River's condition, the evidence shows that the River and its resources remained central to the Nation's culture and lifestyle.

V. Legislative History

This Court has considered the Settlement Acts' legislative history where the text did "not clearly dispose of the question." *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997).

Despite the importance to the Passamaquoddy and Penobscot of their existing unalienated lands, little attention was paid to the delineation of their Reservations, presumably because it was a noncontroversial confirmation of existing property rights. The surviving Reservations were not up for grabs. The River was either part of the Penobscot Reservation or it was not. The legislative history does not reflect any demand by Maine for cession of existing Reservation lands nor any view by Congress that it would be "fair and just," MICSA § 1721(a)(7), to now strip the tribes of land they had not previously lost.

While their Reservations were the heart of their aboriginal territories, the Passamaquoddy and Penobscot demanded a larger land base to include forest lands for economic self-sufficiency. Congress accomplished this by providing federal funds for the purchase from willing sellers of additional lands the United States would take into trust for the tribes' benefit. MICSA's and MIA's legislative reports and hearing documents focused on this federally funded acquisition of forest lands to provide economic bases for the tribes, other federal monetary compensation, and the allocation of sovereign authority among the tribes, Maine, and United States within the *existing* Reservations and to-be-established Territories.[31]

[31] The Nation's statement to Congress of its demands for additional land and monetary compensation (Me.Br.16 n.7) does not suggest that confirmation of its existing Reservation was not a "priority."

Maine fails to credit (Me.Br.18,49) the significant, albeit limited, legislative history (U.S.Br.3,10,28,33,44) documenting the intent to confirm the existing Reservations of the Passamaquoddy and Penobscot, both riverine peoples, including their riparian rights to submerged land.

A. MICSA's Legislative History

Maine acknowledges (Me.Br.51) the statement in the House and Senate Reports that the tribes "will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them." This acknowledgment contradicts Maine's statement in the preceding paragraph (*id.*) that the "treaties were not incorporated into the Settlement Acts." Maine does not assert that the Nation ceded the riverbed but advances the more limited argument (Me.Br.52) that "any rights it had to the river and to submerged land were transferred and extinguished" pursuant to MICSA § 1723(b), an argument refuted in Part III.C.2 above.

The legislative history does not support Maine's assertion (Me.Br.51) that Congress understood the Nation's existing Reservation to consist solely of the island uplands. Maine first points (Me.Br.48) to a map submitted to the Senate Select Committee on Indian Affairs by Donald Perkins, counsel for the Maine landowners who wished to sell forest lands. Mr. Perkins testified at the July 1980 hearing that "[t]he tribes persisted in their efforts to obtain lands near their

reservations" and were able to find "several middlesize owners who were willing to sell large tracts of land in the general area of their reservations." P.D.278: 4476 [JA___]. He discussed the options contracts and urged favorable tax treatment for the sale proceeds. P.D.278: 4475-4477,4569-4580 [JA___]. Senator Cohen asked Mr. Perkins to submit a map "designating the areas that are now under consideration for sale" because this "is certainly going to be an area of consideration by our colleagues." *Id*. at 4570 [JA___]. Mr. Perkins thereafter submitted a map captioned "Tentative Indian Settlement Lands." P.D.278: 4570-4571 [JA___]. The map depicted the large tracts of land for sale, and the much smaller existing reservations, which had been discussed only in the context of their geographical relationship to the lands to be acquired. The version of the map included in the Senate hearing report is barely legible. There is little reason to believe that Congress formed any conclusion about the Penobscot Reservation's boundary from Mr. Perkins' submission, since it was neither submitted, nor useful, for that purpose.[32]

[32] Nor does the map shed much light on Maine's view of the Reservation boundaries. The record does not reflect the instructions given the mapmaker. Submerged lands are often not depicted on maps. For example, Maine owns three miles of submerged land along the Atlantic coast under the Submerged Lands Act, 43 U.S.C. 1301-1315, but the map does not depict that jurisdictional boundary.

Maine also points (Me.Br.48) to a short background paper Interior included in a hearing submission to the House Committee on Interior and Insular Affairs, which noted that "[t]he Penobscot have a 4,000 acre reservation on a hundred islands in the Penobscot River north of Bangor." P.D.281: 5800 [JA__]. Maine's conclusion (Me.Br.48) that Congress understood from this that the Reservation was limited to the island uplands is unwarranted because the Main Stem's bank-to-bank acreage was not reported to Congress.[33]

Maine had much to gain and little to lose by confirming the Nation's existing reservation, including the riverbed. Maine concedes that it entered the settlement negotiations from a position of disadvantage. Me.Br.25 n.14 ("The Tribes had won a substantial legal victory in [*Morton*] that effectively placed a cloud on titles throughout two-thirds of the State."). Nonetheless, Maine achieved

[33] Interior had no reason then to focus on whether the existing Reservation included the riverbed. In contrast, in *Idaho v. United States*, 533 U.S. 262, 267-68 (2001), Interior formally surveyed the Coeur d'Alene Reservation in 1883 and expressly informed Congress in 1888 that the tribe had rights to Lake Coeur d'Alene's bed. Moreover, it is not unusual to report only the upland acreage where submerged land is included within a jurisdictional boundary. For example, the acreage of Maine's Swan Island Wildlife Management Area is reported to be 1,480 acres on one webpage of the Maine Department of Inland Fisheries & Wildlife ("IF&W"), http://www.maine.gov/ifw/wildlife/land/department/region_b/stevepowell.htm (last visited January 18, 2017). An additional 536 acres of tidal flats is reported in an IF&W brochure, available at http://www.maine.gov/ifw/education/swanisland/index.htm (last visited January 18, 2017). And a topographic map also available at the latter webpage shows that there is additional unquantified submerged land in the river channels.

a settlement requiring confirmation of the existing reservations but no contribution of additional land, no monetary contribution, and a jurisdictional arrangement under which "the sovereignty of the State over all its land and people would not generally be compromised," unlike the "often unsatisfactory arrangements … in the West." Senate Statement of Governor Joseph Brennan, P.D.278: 4427-28 [JA___].

Governor Brennan's Senate testimony described the "economic chaos" Maine would face if the tribes' land claims were litigated. P.D.278: 4425 [JA___]. Although Maine Attorney General Cohen had estimated that Maine had a 60-percent chance of prevailing, Governor Brennan pointed out that a "40-percent chance of losing … 12 million acres … and $25 billion" supported settlement. P.D.278: 4431 [JA___]. He expressed his view (which Congress accepted) that, in light of Maine's past payments for the "welfare of the tribes," "Maine should not be asked for additional dollars and land." P.D.278: 4426-4427 [JA___]. He also stated his awareness that one area in which state sovereignty would be compromised was tribal control over hunting and fishing:

> By treating the Indian territories as municipalities, this settlement provides that our Indian citizens would be on a substantially equal footing with their fellow citizens in other towns and cities for the first time in our history. … [T]here are technical modifications that will distinguish these municipalities from others relating to eminent domain, local courts for rather minor matters, and local control of certain aspects of hunting and fishing. Aside from these exceptions, these tribal municipalities will be governed by State law. The Indians

> would be full-fledged citizens responsible for their own services, taxes, welfare, and destiny just like the people in every other city and town in our State. I can think of no better way to create in our Indian communities a sense of self-sufficiency and self-respect than through the reform contained in the Maine Implementing Act.

P.D.278: 4427-28 [JA___].

Contrary to Permittees' suggestion (Per.Br.12), it does not "def[y] credulity" that Maine would agree to confirm the existing Reservation, including the riverbed. The River's inclusion would promote this riverine Nation's "self-sufficiency and self-respect" far more than stranding Penobscot members on the island banks, as Maine and Permittees now propose.

Given Maine's longstanding exercise of authority over the Maine tribes, Congress was prepared to accept a jurisdictional arrangement that gave Maine broader powers over Indian lands than other states. Because of this broader state authority, holding that the Main Stem riverbed is part of the Reservation will be of little consequence for Maine's non-Indian citizens. But Congress was not prepared to ratify a diminishment of the tribes' existing reservations. This Court should reject Maine's effort to renege on its limited, but important, concession of tribal control over hunting and fishing.

B. MIA's Legislative History

We relied (U.S.BR.28) on the acknowledgment in the April 2, 1980 report of the Maine Legislature Joint Select Committee on Indian Land Claims that the

Passamaquoddy and Penobscot Reservations "include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of State law." P.D.264: 3971 [JA__]. Maine's argument (Me.Br.52-53) that "riparian rights" were not understood to include ownership of adjacent submerged land is refuted by Maine Attorney General Cohen's April 1, 1980 memorandum to that Committee:

> The external boundaries of the Reservations are limited to those areas described in the bill including any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or which are included by operation of law. In particular, the Reservation at Pleasant Point includes the intertidal zone since the deed of conveyance includes lands to low water.

P.D.263: 3965 [JA___].

Maine's reliance (Me.Br.52-53) on *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996), is unavailing. In that case, involving the club's right to wharf out onto state-owned submerged lands, the court listed some common-law riparian rights, citing Farnham, *Water and Water Rights* § 62 (1904). *Id*. In Farnham's view, because "ripa" means "bank," "riparian" rights "depend upon lateral contact with the water, and not upon ownership of the soil under the water." Farnham § 63 at 281-82. But Farnham acknowledged that "courts do not fully agree in their enumeration of these rights," *id*. § 62 at 279, and other scholars treat ownership of the subsoil of adjacent waterbodies as a "riparian" right. See, *e.g.*, Amy Kelley, *Waters and Water Rights* § 6.01(a)(6) (3d ed. 2016).

VI. The Parties' Post-Enactment Understanding

"[T]he practical construction adopted by the parties" is appropriately considered when interpreting treaties. *Mille Lacs*, 526 U.S. at 196. Maine acknowledges (Me.Br.12) that the parties' intent in the Settlement Acts is similarly illuminated by their post-enactment conduct, pointing to the Nation's postings along the River.

But Maine once again misrepresents the facts, falsely asserting (Me.Br.12) that the Nation's "informational kiosk" references the islands but "contains no reference to use of the river itself." That display (ECF110-5 [JA___]), captioned "Penobscot River: Home of the Penobscot Nation," is all about the Nation's use of the River and clearly depicts "Tribal Waters" on the map. Maine's quotation omits the underscored phrase that refutes its point: "To obtain fiddlehead or duck hunting permits for the islands, for information regarding other allowable uses of the reservation or to report water quality problems, contact the Penobscot Nation Department of Natural Resources." See ECF140 ¶58 (informing Maine of this omission in its Statement of Material Fact) [JA___].

We demonstrated (U.S.Br.49-54) that Maine's post-enactment positions evidenced its understanding that the Reservation included at least some portion of the riverbed. Maine's efforts to blunt the force of these concessions misstate the record.

With respect to Maine Attorney General Tierney's 1988 letter acknowledging the Nation's right to fish for Atlantic salmon in the Main Stem (U.S.Br.52), Maine incorrectly asserts (Me.Br.19 n.12) that he was addressing only the gill-net "method" not the "scope of the Reservation." General Tierney expressly stated that the Penobscot proposed "to place gill nets in the Penobscot River within the boundaries of the Penobscot Reservation." ECF103-30 [JA___]. The on-reservation location was critical because otherwise gill nets would be prohibited. *Id*. His letter does not mention any "policy of allowing sustenance fishing in the Main Stem" (Me.Br.19 n.12). Until 2012, Maine understood the Reservation to include the River.[34]

Maine's concession in a 1997 FERC filing that the Reservation includes the riverbed to the thread (U.S.Br.50-51), cannot be dismissed as a single-sentence "error," as Maine now suggests (Me.Br.53 n.30). State Solicitor Warren presented a considered interpretation of the title the Nation reserved in its Treaties. ECF105 at 2559-2560 [JA___]. And that interpretation followed his 1996 FERC filing in which he stated Maine's position "that members of the Penobscot Indian Nation

[34] Bennett Katz's 1995 statement (ECF104-61 [JA___]) that the Maine legislature understood that the Penobscots' sustenance-fishing right would be exercised in the River was made in his capacity as Chairman of the Maine Indian Tribal-State Commission and cannot simply be dismissed (Me.Br.49) as a belated declaration of a former legislator.

have a right to take fish for individual sustenance pursuant to [MIA] from that portion of the Penobscot River which falls within the boundaries of the Penobscot Indian Reservation." ECF104-79 at 2286 [JA___].[35]

VII. Equitable Doctrines Do Not Bar Plaintiffs' Claims Seeking an Interpretation of the Settlement Acts

Maine's reliance (Me.Br.57-59) on *City of Sherrill v. Oneida Nation*, 544 U.S. 197 (2005), is utterly misplaced. The district court implicitly rejected this argument without discussion. The Oneida conveyed the land at issue in *Sherrill* in 1805 (albeit without the required federal approval) and reacquired the land in the 1990s. In contrast, the question here is whether the riverbed was reserved from the Nation's treaty cessions and thus has always been part of its existing Reservation, confirmed by MICSA in 1980. Plaintiffs are seeking a determination of the Reservation's boundary under the Settlement Acts, not to extend the boundary.

Further, Maine is in no position to seek equitable relief against the Nation. "'He who comes into equity must come with clean hands.'" *Precision Inst. Mfg.*

[35] Maine notes (Me.Br.11-12) the "stunned" reaction of the "dam owners" (citing ECF118 ¶11C which references a FERC filing relating to West Branch dams) to Interior's 1995 conclusion that the Reservation includes the Main Stem, but fails to note Solicitor Warren's disagreement: "To the extent that it has been argued that the Penobscots have no sustenance fishing rights in the Penobscot River, we disagree." ECF104-79 at 2286 [JA___]. Solicitor Warren's "emphatic[]" disagreement (Me.Br.12) was with the notion that the Nation "retained all its rights to the *entire* river," but he did not specify which parts he thought were ceded. ECF104-79 at 2286 (emphasis added) [JA___].

Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945) (quoting "the equitable maxim"). Maine unfairly seeks to portray the Nation as the party belatedly trying to change deals made in the Treaties and Settlement Acts, but the record instead shows that *Maine* is trying to change the deals. Maine refuses to own up to its prior agreement that the Reservation would include a meaningful portion, if not all, of the Main Stem so that the Penobscots' most important hunting and fishing grounds would be protected.

VIII. Rule 19 Is No Impediment to Interpreting the Settlement Acts to Include the Riverbed in the Reservation

We argued (U.S.Br.54-56) that Rule 19 does not require joinder of all riverside landowners because Maine can adequately represent their interests in construing the Treaties and the Settlement Acts, the issues to be decided in this action. Maine did not disagree (see Me.Br.56 n.31), thus conceding this point.

Permittees baldly assert (Per.Br.33 n.21) that the riverside landowners' interests are different without identifying any different interest. Maine (as Massachusetts' successor) is the appropriate party to litigate whether the Nation ceded the riverbed in its Treaties. If it did not, Massachusetts had no riverbed title to convey and the particulars of the riverside landowners' deeds are immaterial. If any riverside landowners have been led to believe that they obtained greater title than Massachusetts received, that is a separate matter between any such landowners and Maine.

Further, we have acknowledged that riverside landowners could potentially claim in other actions that transactions or other circumstances related to their specific parcels effected a "transfer" under the Settlement Acts. Maine, for example, has suggested that transfers occurred in connection with the construction of the Main Stem dams. ECF104-79 at 2286-2287 [JA___]. This action is not a "quiet title" action in form or substance, as it does not seek to decide, or preclude, any such particularized claims to title. An unsupported threat of multiparty litigation is no basis for interpreting the Settlement Acts to exclude the riverbed.

IX. The "Halo" Reservation

We have demonstrated that the Treaties cannot reasonably be interpreted to cede more riverbed than a non-Indian island owner would presumptively retain. This is particularly so given the Penobscots' indisputable intent to retain their right to fish in the River. We have also demonstrated that Maine's "transfer"-by-regulation argument must be rejected. The Reservation thus must extend *at least* to the thread of the channels surrounding the islands.

Maine's argument (Me.Br.52) that such a reservation boundary would be "impractical" and an "enforcement nightmare" is undercut by its stated understanding of that boundary prior to the 2012 letter which precipitated this action. Many jurisdictional boundaries run through rivers and lakes. But to the

extent Maine's practical concern has merit, it should lead to the conclusion that the Reservation boundaries are the Main Stem riversides, not the island banks.

RESPONSE TO CROSS-APPEAL

Summary of the Argument

Having sought a declaration of the Reservation boundary for all purposes, Maine's inconsistent argument that the district court has no jurisdiction to consider the Nation's on-reservation fishing right is wholly without merit. MICSA's bar on the United States' assertion of *pre-MICSA* claims does not preclude the United States from seeking an interpretation of MICSA. And Permittees' limited additional arguments challenging the district court's holding that the Nation's sustenance-fishing right extends bank to bank are unpersuasive.

Argument

I. There Is a Justiciable Case or Controversy Regarding the Reservation Boundary, Which Determines the Geographical Scope of the Nation's Sustenance-Fishing Right

Maine's argument (Me.Br.59-63) that the district court lacked jurisdiction to declare the geographical scope of the Nation's sustenance-fishing right is based on an incomplete presentation of the parties' claims and counterclaims. When all the claims and counterclaims are considered, it is apparent that the Nation suffered legal injury from the Maine Attorney General's 2012 directive that "the River itself

is not part of the Penobscot Nation's Reservation" (ECF105-78 [JA__]), and that there is a ripe case or controversy regarding the Reservation boundary.

The Nation's Second Amended Complaint (ECF8 at 15-16 [JA___]) requested a declaratory judgment with respect to "the Nation's rights and authorities confirmed by Congress in" MICSA, which include, *inter alia*, the Main Stem sustenance-fishing right and the right to regulate hunting "within the waters of the Main Stem." Defendants did not move to dismiss the Nation's claims for lack of jurisdiction, but instead answered and asserted a counterclaim seeking a declaration that, *inter alia*, "[t]he waters and bed of the main stem of the Penobscot River are not within the Penobscot Nation reservation" (ECF59 at 11 [JA__]). Maine then moved for summary judgment and Permittees moved for judgment on the pleadings to obtain the desired declaration.

Defendants agree with Plaintiffs that there is only one Reservation boundary for all purposes. Defendants' concession that there is a justiciable dispute about the Reservation boundary with respect to hunting is inconsistent with their argument that the district court lacks jurisdiction to declare the same Reservation boundary with respect to fishing. These are two sides to the same coin. In the guise of a no-jurisdiction argument, Defendants are actually trying to bias this Court's decision on the merits by eliminating from consideration the on-reservation sustenance-fishing provision which most clearly demonstrates that

Defendants' uplands-only interpretation cannot be correct (let alone unambiguously correct). Maine's current "policy of not interfering with PN members' sustenance fishing in the Main Stem" (Me.Br.60) is merely an "informal policy" of the Maine Warden Service (ECF118-6 at 7054 [JA___]) which could readily change. It is no basis for ignoring MIA § 6207(4) in determining the Reservation boundary for all purposes for all time.

Moreover, the 2012 directive constituted an immediate repudiation of the Nation's statutory *right* to fish in the River. That action undermined tribal self-government, and can be challenged. See *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976) (state actions undermining tribal sovereignty support standing "[s]ince the substantive interest which Congress has sought to protect is tribal self-government"). Maine misplaces reliance (Me.Br.62-63) on cases in which plaintiffs challenged broadly applicable statutes and regulations prior to any specific application to them.

II. The District Court Permissibly Allowed the United States to Intervene

Section 1723(a)(2) bars the United States from asserting any claim "arising before" MICSA's enactment and asserting that a "transfer was not made in accordance with" Maine laws. Maine's argument (Me.Br.63-65) that this provision bars the United States from supporting the Nation in this case mischaracterizes our claim.

Our claim for a declaration that MICSA set the Reservation boundary at the riversides, or at least the threads, did not arise "before" MICSA, but arises *from* MICSA. Our position is that the Settlement Acts are properly interpreted to confirm a Reservation which includes the riverbed. Our interpretation of the Settlement Acts and of the geographical scope of the referenced treaty transfers is *informed* by background principles of state common law, but we are not challenging the treaty cessions or any other transfer as violating Maine law.

III. The District Court Correctly Concluded that the Sustenance-Fishing Right Extends Bank to Bank

The parties agree that the "Reservation" should have the same boundary for all purposes,[36] and presented their arguments on the boundary's location in the briefing on Plaintiffs' appeal. That briefing appropriately addresses the sustenance-fishing provision.

Permittees make five points in their "Cross-Appeal" brief (Per.Br.39-46). The first two simply summarize the arguments both Defendants made in the "Appeal" portions of their briefs: (1) MIA § 6203(8) is unambiguous (Per.Br. 42); and (2) Maine regulated tribal fishing before and after the Settlement Acts (*id*.).

[36] Permittees mischaracterize (Per.Br.41 n.25) the United States' argument. We advocate a single boundary for all purposes, which should include the riverbed bank to bank but at least to the thread of the channels.

The third point is new. Permittees argue (Per.Br.42-43) that Section 6207(4) might not be entirely without meaning because the Passamaquoddy might still be able to fish within their Reservation. Since the Passamaquoddy Tribe is not a party and the Passamaquoddy Reservation's boundary is not at issue, it is hardly surprising that "[n]o one has ever suggested" (Per.Br.42) in this action that the Passamaquoddy cannot reasonably fish within their Reservation. We note, however, that Defendants' argument that the Penobscot Reservation's definition makes no express reference to "submerged land" also applies to the Passamaquoddy Reservation's definition, MIA § 6203(5). In any event, Congress intended to afford *both* the Passamaquoddy and Penobscot "a fair and just settlement," MICSA § 1721(a)(7), which included the confirmation of their existing reservations as the most fundamental component. This argument provides little basis for concluding that Section 6203(8) unambiguously excludes the Penobscot River.

The fourth point (Per.Br.43) is simply the bald assertion that Penobscot members can fish in the River while standing on the Reservation islands. We addressed this argument in Part III.B above because it was related to the other arguments discussed there.

Permittees' fifth point (Per.Br.43-45)—fishing was not very important to the Penobscot in 1980—elaborates on Maine's point which we addressed in Part IV

above. We restate our disagreement. Permittees' reference to the "corner grocery" (Per.Br.44) as a fungible source of sustenance indicates a dismissiveness toward the Nation's efforts to preserve culturally important practices and traditions that Congress plainly did not share. See Senate Report at 17 ("Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine.") [JA___].[37]

[37] We note that the Cross-Appellees' reply briefs are properly limited to the arguments we have presented at pages 51-56.

Conclusion

The district court's judgment holding that the Settlement Acts' general definitions of Reservation are limited to the island uplands should be reversed and its judgment holding that the sustenance-fishing right may be exercised in the River bank-to-bank should be affirmed.

Respectfully submitted,

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January 19, 2017
DJ 90-6-13-01057

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 12,991 words in 14-point Times New Roman font (excluding the parts of the brief exempted by Rule 32(a)(7)).

s/ Mary Gabrielle Sprague

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate ECF system and that all participants in this case were served through that system.

s/ Mary Gabrielle Sprague